



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Jay-Brant General Contractors

File: B-274986

Date: January 10, 1997

David M. Freeman, Esq., Wade & De Young, for the protester.
Col. Nicholas P. Retson, Maj. Peter D. P. Vint, and Capt. Kenneth G. Wilson,
Department of the Army, for the agency.
Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid found to include only a photocopy of the required bid bond was properly rejected as nonresponsive where the protester has not provided independent evidence to support its assertion that the original bond was included with its bid package submitted to the agency prior to bid opening and has not persuasively shown that the agency inadvertently substituted a photocopy of the original bond after bid opening.

DECISION

Jay-Brant General Contractors protests the rejection of its bid under invitation for bids (IFB) No. DAHC76-96-B-0016, issued by the Department of the Army, Fort Richardson, Alaska, for the replacement of heating systems in family housing at Fort Wainwright, Alaska. The Army rejected Jay-Brant's bid as nonresponsive because the bidder submitted a photocopy of the required bid bond with its bid. The protester contends that its bid in fact included an original bid bond, which it alleges was photocopied and then apparently misplaced by the agency after bid opening.

We deny the protest.

The IFB required bidders to submit with their bids a bid bond in the amount of 20 percent of the bid price. The Army received seven bids by bid opening on September 19. No representative from Jay-Brant attended the bid opening (although the protester has provided affidavits from representatives of two other bidders who did attend).¹ Jay-Brant's bid was the first to be opened and the bid opening official

¹These representatives do not assert that they examined Jay-Brant's bid.

announced that Jay-Brant's bid bond was in the correct amount (20 percent). The official did not comment about the absence of an original bid bond or state there were any problems with Jay-Brant's bid, either to those in attendance or on the abstract of offers. After reviewing Jay-Brant's bid, the bid opening official returned the contents of Jay-Brant's bid to its original envelope, and proceeded with the opening of the other six bids. There is no indication that any of the bidders examined Jay-Brant's bid at bid opening.

Although Jay-Brant submitted the apparent low bid, the Army rejected Jay-Brant's bid as nonresponsive on September 25 and awarded the contract to Western Mechanical, Inc.--the second low bidder--because, according to the Army's review, Jay-Brant failed to submit an original bid bond (with all seals affixed) with its bid. Rather, the Army found that Jay-Brant's bid only included a photocopy of the bid bond consisting of a completed front page of a Standard Form 24 bid bond--the reverse side was not duplicated--and a photocopy of a power of attorney from Jay-Brant's surety. Jay-Brant was notified that the agency rejected its bid as nonresponsive on October 1. This protest followed.

The protester expressly denies having made the photocopy of its bid bond now in the bid file at the contracting office and attests that it included the original bid bond in its bid. Jay-Brant asserts that the contracting office must have made a photocopy and somehow misplaced the original.

As evidence, the protester has provided an affidavit from the employee responsible for preparing the bid in which he states he included an original bid bond with Jay-Brant's bid and that it is his firm's standard office practice not to make copies of bid bonds. The protester points out that the bid opening official completed and certified the abstract of offers showing that Jay-Brant had submitted the required 20-percent bid bond and that a photocopied bid bond should have been readily apparent to the bid opening officials, and announced and recorded.² The protester states that following bid opening, Jay-Brant representatives contacted agency contracting officials several times about the status of contract award and were not informed that there was a problem with the bid bond but that the award was being processed. According to the protester, when the agency's failure to note an obvious purported discrepancy at the bid opening is combined with the responses of agency contracting officials to subsequent inquiries from Jay-Brant regarding the status of contract award, our Office should conclude that Jay-Brant's original bid bond was included with its bid.

²The protester notes that the day after bid opening, a competing bidder inspected Jay-Brant's bid in the presence of the bid opening official and neither the competitor, who was presumably looking for irregularities in Jay-Brant's bid, nor the bid opening official, noticed anything amiss with the bid bond.

In explaining why the photocopy of Jay-Brant's bid bond was not discovered at bid opening, the bid opening official states in her affidavit that although she "vaguely" remembers something different about Jay-Brant's bid bond--"that the seals did not stand out on the document"--this is not information that would be commented upon during bid opening. The agency states that bid opening officials do not perform a comprehensive review of the bids at bid opening.³ Rather, after bid opening, the official returns all opened bids to their original envelopes, places them into a file folder, inserts them into the main solicitation file, and safeguards them at her desk in the contracting office, which is accessible only to government personnel or those accompanied by government personnel. According to the bid opening official, the bids were secured at her desk or were under her direct observation until September 23, when she turned the solicitation file over to another contracting official for a comprehensive review of the bids and for award processing. The bid opening official states in her affidavit that she did not make any copies of Jay-Brant's bid bond.

The contracting official who conducted this more comprehensive review of the bids noted in her affidavit that although, at first glance, Jay-Brant's bid bond seemed in order, upon further examination, it was apparent that the bond was not an original, but was a photocopy. Further, she stated that the seals of the bidder and its surety, which normally appear on a bond, were not present on Jay-Brant's bid bond. The contracting official confirmed that Jay-Brant's bid bond was a photocopy by comparing it to an original bid bond that Jay-Brant submitted contemporaneously for another solicitation issued by the same contracting office. The official then sought a legal opinion as to the sufficiency of Jay-Brant's bid, transmitted a facsimile copy to the legal office, and returned the bond to the file. The contracting officer states that her office does not make copies of bid bonds unless seeking a legal opinion on the sufficiency of the bond, in which case they send a copy to the agency legal office, as was done here by facsimile transmission.⁴ The contracting officer and the other contracting officials responsible for this solicitation state that

³The agency explains that bid opening officials do not make announcements concerning responsiveness at bid opening and that such information is not furnished in writing to the unsuccessful bidder until the contract is awarded. In response to Jay-Brant's inquiries after bid opening, contracting officials state that they told Jay-Brant that bids were being evaluated.

⁴The protester contends that the staple holes in the photocopy of its bid bond in the solicitation file are evidence that the contracting office makes copies of bid bonds. A contracting official explains that before transmitting a copy of Jay-Brant's bid bond to the legal office via facsimile, she first unstapled the bid bond, and, upon returning it to the file, restapled it.

no copy of Jay-Brant's bid bond was otherwise made and that the photocopy of the bid bond in Jay-Brant's bid was the bid bond submitted with Jay-Brant's bid.

The determinative question in judging the sufficiency of a bid guarantee such as a bid bond is whether it could be enforced if the bidder subsequently fails to execute required contract documents and to provide performance and payment bonds. Southern California Eng'g Co., Inc., B-232390, Oct. 25, 1988, 88-2 CPD ¶ 391. For the bid guarantee to be viewed as enforceable, the surety must appear to be clearly bound based on the information in the possession of the contracting officer at the time of bid opening. Frank and Son Paving, Inc., B-272179, Sept. 5, 1996, 96-2 CPD ¶ 106. Photocopies of bid guarantee documents generally do not satisfy the requirement for a bid guarantee since there is no way, other than by referring to the original documents after bid opening, for the contracting agency to be certain that there had not been alterations to which the surety had not consented and could use as a basis to disclaim liability. Id.; Morrison Constr. Serv., B-266233; B-266234, Jan. 26, 1996, 96-1 CPD ¶ 26. If the agency cannot determine definitely from the documents submitted with the bid that the surety would be bound, the bid is nonresponsive and must be rejected. Global Eng'g, B-250558, Jan. 11, 1993, 93-1 CPD ¶ 31.

While the protester asserts that it submitted an original bid bond, the evidence it has submitted is insufficient to show that it did so or that the agency misplaced the original bid bond after bid opening and substituted a photocopy, as the protester alleges. In light of the various statements contained in this record, the statement by the employee of the protester responsible for the bid that the original bid bond was submitted with the firm's bid, without independent corroborating evidence, simply does not establish that the original bid bond was submitted with the firm's bid. See Secur-Data Sys., Inc., B-255090, Feb. 2, 1994, 94-1 CPD ¶ 68; Zolman Constr. & Dev., Inc., B-247117, Mar. 13, 1992, 92-1 CPD ¶ 284.

In this regard, the agency has explained in detail its procedures concerning the limited review of the bids at bid opening and the careful handling of the bid documents (including how bids were handled until a more comprehensive review of the bids could be performed). The fact that agency contracting officials did not mention a problem with the bid bond to the protester until after bid opening is not persuasive evidence, as the protester contends, that the agency must have lost the original bid bond, since the record shows that this delay in bringing the deficiency to Jay-Brant's attention was due to the fact that the bid was examined in a comprehensive manner for the first time several days after bid opening and to the agency's office policy of not commenting on a bidder's responsiveness until after

award is made. In short, the record does not permit the conclusion that in fact an original bid bond accompanied the protester's bid. That being, we cannot say that the agency's rejection of the bid was improper. See Pacific Ventures Assocs., Inc., B-265878, Nov. 21, 1995, 95-2 CPD ¶ 236.

The protest is denied.

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